View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by DigitalCommons@University of Nebraska

Nebraska Law Review

Volume 57 | Issue 1 Article 5

1978

Groundwater Management in Nebraska without a Legislative Solution: Is There an Alternative?

Mike Klein

University of Nebraska College of Law, kleinlaw@atcjet.net

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation

Mike Klein, *Groundwater Management in Nebraska without a Legislative Solution: Is There an Alternative?*, 57 Neb. L. Rev. 78 (1978)
Available at: https://digitalcommons.unl.edu/nlr/vol57/iss1/5

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Commentary

Groundwater Management in Nebraska Without a Legislative Solution: Is There an Alternative?[1]

I. INTRODUCTION

The 1975 session of the Nebraska Legislature enacted sections 46-656 to 46-674 of the Nebraska Revised Statutes, rather optimistically entitled the "Nebraska Ground Water Management Act."[2] As the legislative statement of intent indicates,[3] the Act is designed to manage and conserve groundwater[4] resources in an effort to insure the present and future economic well-being of the state. The legislative intent also purports to include a "demand," in the public interest, to implement management practices.[5] However laudable this frank legislative recognition of the problem, the Act may fail to accomplish its stated purpose by not providing sufficient means for a politically feasible and constitutionally permissible solution. If that is the case, as an analysis of the Act indicates,[6] and no more definitive and comprehensive legislation is politically attainable, two significant issues remain: First, what judicial means of resolving the problems inherent in a lack of comprehensive management

1. It has been stated by a well-known water law expert that "a rational legal system will not only develop rules for resolving specific conflicts which may arise; it will also devise techniques for avoiding conflict by seeking to assure that there are adequate supplies available and that water is properly used prior to times of crisis." J. SAX, WATER LAW, PLANNING & POLICY 471 (1968).
2. NEB. REV. STAT. § 46-656 to 674 (Cum. Supp. 1976) [hereinafter referred to as the Act].
3. *Id.* § 46-656.
4. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1004 (1971) uses a one word form of "groundwater" as opposed to the legislative title to the Nebraska act. Accordingly, the dictionary usage will be followed here.
5. NEB. REV. STAT. § 46-656 (Cum. Supp. 1976).
6. *See* notes 20-33 and accompanying text *infra*.

are available, and second, how may those means be effected, until or without further affirmative legislative action?

II. THE SCOPE OF THE GROUNDWATER PROBLEM

Hydrological and geological bases of defining problems of groundwater management are the only means of understanding the scope of those problems. The Nebraska Legislature, realistically appraising this notion, provided in the Nebraska Ground Water Management Act that the promulgation of any management solutions should be done on the basis of "relevant hydrologic data, history of developments, and projection of effects of current and new development."[7] This realization is commendable. Without it, and without the provision that any area subject to management regulations must be "define[d] . . . geographically and stratigraphically,"[8] boundaries defined by surface features or political lines could produce chaotic results from attempts to apply corrective measures.[9]

The hydrological studies which are currently available[10] indicate that the major Nebraska groundwater problem area is in the east-central portion of Nebraska, where widespread groundwater mining[11] exists.[12] However, as discussed below, groundwater problems in Nebraska do not follow any set pattern, and such varied problem situations exist that no one solution is feasible. The mining situation in east-central Nebraska shows no immediate prospect for solution by any economically feasible means.[13] This means that the

7. NEB. REV. STAT. § 46-658(1) (Cum. Supp. 1976).
8. *Id.* § 46-658(3).
9. Complete documentation of the physical scope of any groundwater management problem is obviously essential to its resolution. For example, a lack of documentation could result in management controls being made applicable to a surface water basin without regard to the aquifer which gave rise to the problem. Uncontrolled diversion of the aquifer from outside the basin subject to control could completely negate the effect of limiting diversions in the management area.
10. IRRIGATION AGE, October 1976, at 20.
11. Groundwater "mining" occurs when the total amount being pumped from a groundwater basin during a given year exceeds the annual rate of recharge in the basin, with the result that the water table in the basin keeps dropping lower and lower. If groundwater continues to be removed from the basin at a much greater rate than it is being replenished, the entire source may be depleted. *See* J. SAX, *supra* note 1, at 468-71.
12. Large-scale mining has occured in the Big Blue River basin as well as the areas around O'Neill and Imperial, Nebraska.
13. Possibly the most efficient means of solving groundwater mining problems is to utilize an extensive surface storage and use system to

only method of maintaining the aquifer in question, or any aquifer in like circumstances, is to limit the withdrawal of water. This method demands immediate as well as long range planning in regard to the amount of withdrawals to be allowed, and as to the method of control of withdrawals.[14]

III. REGULATION UNDER THE ACT

The Nebraska Ground Water Management Act provides a pervasive regulatory scheme for controlling the use and amount of groundwater diversions.[15] However, the Act itself does not impose the scheme on the problem areas, which the Act terms "control areas."[16] Control areas can only be established after action is instigated by a person or persons in the area sought to be designated. After a hearing, the Director of Water Resources may, in his discretion, designate a control area.[17] The problems inherent in this

---

provide natural recharge of the declining aquifer. *See* Harnsberger, Oeltjen & Fischer, *Groundwater: From Windmills to Comprehensive Public Management*, 52 NEB. L. REV. 179, 284 app. (1973) [hereinafter cited as Harnsberger]. However, the cost of such a system could conceivably be phenomenal. Theoretically, to recharge the aquifer or aquifers necessary to resolve the groundwater problem in east-central Nebraska would encompass a surface storage and use system with the potential to irrigate literally hundreds of thousands of acres. By comparison, the Bureau of Reclamation's proposed Niobrara River project, which will irrigate a maximum of 77,000 acres, will cost approximately $106,000,000.00. Even if surface construction and diversion were economically feasible, complete geological and hydrological studies would have to be undertaken to determine if the area in question would be suitable for an improved groundwater table. In any event, the recent experience of the now defunct Mid-State irrigation project may make it politically and socially unrealistic to assume that even a physically workable and economically feasible surface storage and use system could succeed. (The project's continuation was resoundingly defeated when put to the electorate.)

14. Harnsberger, *supra* note 13, at 264-80.
15. NEB. REV. STAT. § 46-666 (Cum. Supp. 1976) is the basic regulatory section of the Act. It places numerous options in the hands of the regulatory agencies to control groundwater diversions:

> (a) It [the regulatory agency] may determine the permissible total withdrawal of ground water in the designated control area for each day, month, or year, and allocate such withdrawal among the ground water users within the area;
> (b) It may adopt and enforce a system of rotation for use of ground water in the control area;
> (c) It may adopt well-spacing requirements . . . and
> (d) It may adopt such other reasonable regulations as are necessary to carry out the intent of this act.

16. *Id.* §§ 46-657(9) to 658.
17. *Id.* § 46-658.

type of selection process are apparent. Without some initiation of discussion within the area sought to be regulated, the Act has no management effect at all, with the limited exception of mandatory runoff controls.[18] The Director of Water Resources and Natural Resource Districts, charged with responsibility to administer the Act, are thus left helpless to identify and initiate control over problems.

This type of system, while commendable in that it provides for local formulation of issues and consequent controls, is tantamount to a legislative failure to deal with the problem. While the legislative history of the Act indicates that local groups and individuals are aware of declining groundwater levels and are predisposed toward finding means to minimize such declines,[19] there is no assurance that these concerns will manifest themselves as use of the effective controls provided by the Act. To insure control in all problem areas, the legislature would have to delegate sufficient authority to either the Director of Water Resources or the Natural Resource Districts, or some other appropriate agency, to independently recognize and deal with groundwater problems. This is not to say that the local input provided for by hearing procedures is not valuable in tapping local views on groundwater problems.[20] The localized nature of most groundwater deficiencies requires that this continue, but a more definitive allocation of managerial power to the agency responsible for the implementation of the Act would be desirable.

IV. SUBSTANTIVE PROBLEMS NOT ADDRESSED BY THE ACT

Aside from administrative difficulties, several substantive issues which greatly affect the management of groundwater resources in Nebraska are left unrecognized or unresolved by the Act. Each of the issues which the Act does not address has recurred in Nebraska groundwater litigation, and has gone without conclusive judicial resolution. Unfortunately, the legislative failure to at least recognize these questions leaves them again in judicial hands.

The major issue which the Act fails to address is whether private

18. *Id.* § 46-664.
19. *See Hearings on L.B. 577 Before the Comm. on Public Works*, 84th Leg., 1st Sess. 1-26 (March 13, 1975) [hereinafter cited as *Hearings*].
20. The hearing procedure is outlined in NEB. REV. STAT. § 46-658(3) (Cum. Supp. 1976).

property rights in groundwater, if they exist, are cut off by the legislation itself, without administrative action, or are capable of extinction after a control area has been established. The resolution of this issue involves a number of considerations.

First, the Act fails to recognize the hydrologically proven[21] interrelationship between groundwater and surface water. The Nebraska Constitution provides that streamflows are dedicated to the public for beneficial use,[22] but the use of groundwater is not so dedicated, either by constitution or statute. As a result the status of proprietary interests in groundwater is subject to considerable debate. While the legislative intent of the act can be read as a commitment of groundwater to public use, a clearly stated public use dedication would remove any confusion regarding the legislative position. The Nebraska Supreme Court has not shown a predisposition toward recognizing a private property interest in groundwater,[23] but without a conclusive articulation of legislative intent, the Act may encourage litigation.

This encouragement of litigation is especially serious in that groundwater regulation pursuant to Natural Resource District control may be construed as "damaging" to private property values. The Nebraska Constitution requires compensation for public use of property which amounts to "damaging" as well as "taking" of the property.[24] As a result, if the legislative statement of intent in the Act can be argued to be a constitutionally permissible dedication of the use of groundwater to the public, a substantial question arises regarding the need to compensate those landowners whose land depreciates in value as a result thereof. This notion presup-

21. This assertion is not entirely correct in view of the fact that NEB. REV. STAT. § 46-636 (Reissue 1974) provides: "The Legislature finds that the pumping of water for irrigation purposes from pits located within fifty feet of the bank of any natural stream may have a direct effect on the surface flow of such stream." Just what the legislature intended to accomplish by this rather inarticulate and poorly drafted bit of legislation is unclear. The legislative history of the Nebraska Ground Water Management Act indicates that one of the initial complaints against the act was its failure to recognize that groundwater and surface flows are directly connected in the hydrological cycle. *See Hearings, supra* note 18, at 17-18. The foregoing statute hardly goes far as a legislative recognition of that concept.
22. NEB. CONST. art. XV, § 5.
23. *See* Metropolitan Util. Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966).
24. NEB. CONST. art. I, § 21.

poses regulation which will reduce the allowable diversion of groundwater to such an extent that a measurable crop loss on the property involved will result. If such loss can result from controls, there is an issue beyond the constitutional permissibility of dedication of groundwater to the public, that is, compensation for measurable property damage as a result of the public use.[25]

Also bound up with the resolution of the proprietary rights issue is the question of whether any preference or priority system exists within the Act's scheme of groundwater control. Surface waters are subject to both a priority system of appropriation and a preferential scheme of allocation, by statute[26] and constitutional provision.[27] By way of comparison, some explanation of the two notions is warranted.

Priorities operate on the familiar first in time, first in right basis that permeates so much of the law of property rights. The priority doctrine was originally developed by judicial decision, but has since been codified in most jurisdictions.[28] Most statutes operate by requiring the user of the water resource to obtain permission in some form, usually by permit, from the appropriate governmental agency.[29] The user must then put the appropriated water to a defined beneficial use[30] to establish his right to divert. The right then becomes protectable as of the date of the permit. Most statutes require that the beneficial use begin within a designated time

25. It seems that a vested proprietary rights argument is a defensible position, if only by implication in Nebraska. While the Nebraska Supreme Court cases which dealt with groundwater issues, *see, e.g.*, Metropolitan Util. Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966); Luchsinger v. Loup River Pub. Power Dist., 140 Neb. 179, 299 N.W. 549 (1941); Olson v. City of Wahoo, 124 Neb. 802, 248 N.W. 304 (1933), do not specifically recognize such a right, it is arguable that proprietary interests are clearly presumed to exist. The *Olson* case provides a good example. The court based its decision on a question of proximate cause. The court held that if no vested proprietary right exists in the unimpeded use of the groundwater resource, no cause of action exists against one who interferes with such use, and no causation issue arises. The prospect of allowing damages for an interference resulting from a neighboring diversion seems to confirm that the proprietary right exists in the landowner.
26. NEB. REV. STAT. § 46-204 (Reissue 1974).
27. NEB. CONST. art. XV, § 6.
28. *See, e.g.*, NEB. REV. STAT. § 46-203 (Reissue 1974).
29. *See, e.g., id.* § 46-233.
30. For a discussion of proposals to reform the beneficial use concept as it applies to surface water use, see Fischer, Harnsberger & Oeltjen, *Rights to Nebraska Streamflows: An Historical Overview with Recommendations*, 52 NEB. L. REV. 313, 370-73 (1973).

after the issuance of the permit,[31] and continue throughout the time the user claims an appropriative right. Failure to maintain beneficial use or to avoid waste are conditions which usually suspend effectiveness of the priority, or extinguish it completely.[32]

Preference systems are superimposed over priorities. This means that a statutorily defined higher preference user may obtain water from a lower preference, higher priority user in times of shortage, if he compensates the lower preference user for any damage incurred as a result of this taking. Appended to this system is a typical caveat that a domestic user may exercise his right to preferential treatment without compensating a lower preference user who is damaged.[33]

In regard to groundwater, while the Nebraska statutes delineate a preference system for use of groundwater,[34] the result of this articulation is not clear. If this preference scheme is viewed as vesting groundwater rights in users preferred under the statutue, this fosters the idea that some property right, which is capable of enforcement by judicial or administrative means, does exist in groundwater. Unfortunately, this again not only creates administrative difficulty in utilizing the management procedures provided in the Act, but encourages litigation based on proprietary interests. Presumably, actual shortages of groundwater supplies for domestic use, as defined by the statute,[35] will not eventuate if management practices are instituted. But in the absence of controls, widespread domestic shortages occasioned by the depletion of a large aquifer could result in incalculable loss to lower preference users who would presumably be denied in times of shortage.[36]

Two other substantive issues arise in considering the deficiencies of the Act. One is the problem of interbasin transfers, which in Nebraska have been prohibited by judicial fiat since 1936.[37] While

31. *See, e.g.*, NEB. REV. STAT. § 46-238 (Reissue 1974).
32. *But see*, with reference to groundwater rights, Harnsberger, *supra* note 12, at 242-43.
33. *See generally* 78 AM. JUR. 2d *Waters* §§ 317-328 (1975).
34. NEB. REV. STAT. § 46-613 (Reissue 1974).
35. *Id.*
36. *See* Harnsberger, *supra* note 12, at 201: "[E]ach one dollar of crop production made possible by irrigation created an additional 6.68 dollars in business volume in other segments of the economy."
37. Osterman v. Central Nebraska Pub. Power Dist., 131 Neb. 356, 268 N.W. 334 (1936).

the issue of transfers is beyond the scope of this article,[38] it is necessary to note that the continued prohibition of interbasin transfers by the judiciary restricts the improvement of groundwater aquifers through surface storage and use.[39]

The second issue has caused much discussion. The statute contains no definition of beneficial use, and the preference scheme it sets up places no value on either environmental, recreational or aesthetic values.[40] These quite obviously have a great deal of value to some, and absolutely no value to others. As a result, the issue is largely political, and should not be dealt with other than by legislation. A good example of a means by which environmental, recreational and aesthetic values can be safeguarded is section 37-109 of the Nebraska Revised Statutes,[41] which provides for the acquisition and management of wildlife habitat lands by the state. This statute avoids the difficult task of overcoming the accusation that these interests are to the detriment of agricultural interests, which should be protected in any water legislation.

V. JUDICIAL MEANS OF RESOLVING THE ISSUES RAISED BY THE ACT

The resolution of the issues presented by the inadequacies of the Act will ultimately fall upon the judiciary. The focus of judicial inquiry, to be effective, must be on how to integrate the resolution of those issues into a coherent form which will facilitate long range planning for groundwater use by the persons and agencies that are best equipped to deal with the problems. It is thus important to focus on each of the issues and to determine the possible answers to both of the two questions initially raised: (1) what judicial means of resolving the issues presented are available; and (2) how may those means be effectuated?

A. Judicial Means for Controlling Groundwater Management

To approach the problems presented by the Act and prior judicial attempts at management of groundwater resources, an awareness of judicial means of groundwater management is neces-

38. For an excellent discussion of this issue, see Oeltjen, Harnsberger & Fischer, *Interbasin Transfers: Nebraska Law and Legend*, 51 NEB. L. REV. 87 (1971).
39. *Id.*
40. NEB. REV. STAT. § 46-613 (Reissue 1974).
41. NEB. REV. STAT. § 37-109 (Cum. Supp. 1976).

sary. The basic judicial rules involved may be grouped into a triumvirate.

The English, or common law rule, which arose from the ancient concept that a property owner was master of not only the surface of his ground, but the subterranean strata beneath it and the atmosphere above it as well, was first articulated in *Acton v. Blundell.*[42] The rule is one of absolute ownership: the overlying landowner can utilize as much water as he can divert, even if his definition of "utilize" includes wasting water to the detriment of his neighbor.

The American, or reasonable use, rule is based upon the familiar tort doctrine of "reasonableness." While it limits the wasting of groundwater to the detriment of other users, it otherwise is a rule of absolute ownership.[43] The reason for this result is that courts have been disposed to employ an economic balancing test to determine if a use is "reasonable;" in most instances, the higher volume user, who has limited groundwater use by his neighbor, was the most economically productive. While preference statutes have been appended to the rule to insure that uses which are essential to the maintenance of society will remain unimpeded, the effect has been to allow the purchase of a license by a larger volume user of water. Thus, rather than restricting the property right provided by the common law rule of absolute ownership, the courts have been merely raising the ante.

The final groundwater management tool which courts have implemented is the correlative rights doctrine adopted initially by the Supreme Court of California in *Katz v. Walkinshaw.*[44] It amounts to judicially legislated allocation of groundwater resources in times of shortage. The problem with this type of judicial management is that the administrative problems it creates are immense. Courts must retain jurisdiction of each conflicting use case with which they are confronted in order to enforce their original decrees allocating groundwater resources. This taxes judicial time. The ideal situation in these circumstances, if mandatory legislative control is non-existant, is to have at the disposal of the judiciary an administrative agency which possesses the requisite expertise to provide informed advice regarding groundwater decisions. Unfortunately, the usual situation is that the understaffed

42. 152 Eng. Rep. 1223 (Ex. 1843).
43. *See* Meeker v. East Orange, 77 N.J.L. 623, 74 A. 379 (1909).
44. 141 Cal. 116, 70 P. 663 (1903).

and non-expert judicial branch must maintain a continual vigil on the groundwater problems with which it is confronted.

The Nebraska Supreme Court's position regarding judicial management of conflicting groundwater uses is unclear. In the first case in which the court was confronted with the issue in 1933, the court announced the following rule:

> The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning.[45]

This implies that the court will adhere to the conventional reasonable use rule when no observable shortage of a groundwater resource exists, but the final phrase suggests the correlative rights doctrine. As a result, the court's holding is subject to considerable conjecture. This is particularly true in view of the fact that the court has used both reasonable use[46] and correlative rights[47] language subsequent to the *Olson* decision. Regardless of which test the court chooses to apply, the focus of inquiry in litigation arising under the Act must be the type of controls which the Act provides, if there is to be some continuity in the management of groundwater in Nebraska.

A fourth judicial doctrine has been suggested by the drafters of the Second Restatement of Torts[48] and has received favorable response from the commentators.[49] The proposed restatement rule is based on a concept of unreasonable interference. It changes the judicial inquiry from the reasonableness of an interfering use to the unreasonableness of an interference itself. Thus a court would theoretically not be predisposed toward a balancing test based upon productivity factors, but would be governed by considerations of ability to bear the cost of maintaining an adequate diversion for

45. Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933).
46. Metropolitan Util. Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966).
47. Luchsinger v. Loup River Pub. Power Dist., 140 Neb. 179, 299 N.W. 549 (1941).
48. RESTATEMENT (SECOND) OF TORTS § 858A (Tent. Draft No. 17, 1971).
49. *See, e.g.*, Harnsberger, *supra* note 12, at 252-54.

both users involved, the type of use to which each diversion is being put, and the amount of water necessary to maintain both of the competing uses.

It is obvious that each of these four means of judicial resolution, with the possible exception of the correlative rights doctrine, is geared only to the resolution of individual, isolated competing use cases. This is largely due to the constraints under which the judiciary must, of necessity, operate.

B. Constraints on Judicial Decisionmaking

The judicial branch is limited to the consideration of issues and information which are supplied to it by the parties in individual cases. Therefore, the judiciary is deciding area-wide issues on groundwater supplies with only minimal information regarding area-wide problems. Decisions are also based upon after-the-fact considerations of use and the reasonableness of that use, and not upon future needs of persons other than the parties before the court.

To some extent, these inherent problems may be alleviated by the expression of legislative intent in the Act. If the judiciary approaches each individual conflicting use problem with the future economic needs of the entire state in mind, as directed by the Act, area or aquifer wide shortages and problems may now be considered in reaching decisions in individual cases.

The judiciary is also constrained by its age-old guiding concept, stare decisis, which requires that past decisions, reached without the benefit of information which is available today, be followed in making new groundwater management decisions. Overcoming the problems created by stare decisis and the adversary system is the major challenge which faces the judicial branch as it attempts to deal with, and hopefully resolve, the problems created by the Act.

C. Judicial Resolutions of the Problems Created by the Act

The problem, left open by the Act, of whether vested property rights in groundwater are subject to legislative control or extinction, is characteristically a judicial field of inquiry. So that the Act may at least partially fulfill its purpose, it should be construed as constitutionally valid legislation. Several methods of reaching this result are open to the judiciary. It may consider the constitutional dedication of surface water resources as sufficient to dedicate

the groundwater of the state to public use as well.[50] It may utilize the rather unfair judicial doctrine of *damnum absque injuria* to cut off any potential right to damages that overlying landowners may have as a result of control of their groundwater withdrawals. But it must, if the Act is to be effective at all, find the controls the Act utilizes as non-compensable regulation of a property right, if such right exists in groundwater, rather than a compensable damaging or taking.

While the foregoing decision is of critical importance, it may well not be the type of decision which will have the greatest impact on management of groundwater. Rather, the decisions with the most effect will be those in individual conflicting use cases, arising outside control areas where no taking or damaging issues will be present, but which will form the judicial pattern of acceptance or rejection of the controls provided in the Act. Without cooperation between the judicial branch and that portion of the executive charged with the responsibility to administer the Act, the same problem evident without any management scheme—a piecemeal group of decisions and administrative actions— will continue. The judicial branch must thus devise not only a means of dealing with its own doctrine of stare decisis in dealing with the problems which arise with the constitutionality of the Act and the issues of taking and interbasin transfers, but must also discover a method it can utilize to overcome the practical problems of obtaining information and creating area-wide policy.

Probably the most effective method of improving the amount and type of information the judiciary has available to it in deciding area-wide policy considerations is the procedural rule of "indispensable parties." This rule has been articulated on several occasions:

> Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their rights, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience.[51]

This procedural tool can be employed in two ways.

---

50. NEB. CONST. art. XV, § 5.
51. City of Omaha v. Danner, 186 Neb. 701, 703, 185 N.W.2d 869, 871 (1971). *See also* Ohmart v. Dennis, 188 Neb. 260, 196 N.W.2d 181 (1972); Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N.W.2d 630 (1956); NEB. REV. STAT. § 25-323 (Reissue 1975).

The court could construe "indispensable party" to include the Director of Water Resources or the Natural Resource District in which the conflict arose, or in which the decision will have an effect. This would give the administrative agency charged with the duty of formulating a groundwater policy for the state a forum for the policies it intends to promulgate where there has been no control area designation. It could also provide the judicial officer hearing the case with the information necessary to make a decision on sound hydrological considerations and groundwater policy.

The court could also construe "indispensable party" to include all groundwater users whose supply will potentially be affected by the decision in the case before it. This would provide the court with the opportunity to examine the entire use being made of the affected aquifer, and allow it to consider not only the arguments of the conflicting parties, but the arguments of the broad spectrum of users who elect to participate in the decision-making process as parties. It would not only afford the users the opportunity to express local attitudes and economic factors other than those important to the conflicting users, but would give the court the opportunity to render a decision which would be binding on all persons diverting water from the aquifer.

VI. CONCLUSION

The Nebraska Ground Water Management Act is a start toward comprehensive groundwater management in Nebraska, and with the help of a concerned judiciary, can serve as a vital tool in developing a statewide groundwater policy. If the judicial branch is receptive to the idea that it must act in concert with the legislature to insure sufficient groundwater supplies for both present and future use, it can devise tools which will allow it to remove past barriers to comprehensive management, and effectuate the purposes stated in the Act.

Mike Klein '77